

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

Chapter 7

DEREK KOFI JACKSON,

Case No. 05-15085 (PCB)

Debtor.

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DEREK KOFI JACKSON,

Plaintiff,

Adversary No. 06-01433

v.

THE EDUCATION RESOURCES
INSTITUTE, BROOKLYN LAW
SCHOOL, SALLIE MAE and
EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Defendants.

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APPEARANCES:

Derek Kofi Jackson
Pro se Plaintiff
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New York, NY 10031

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MEMORANDUM DECISION GRANTING DISCHARGE OF DEBTOR'S STUDENT LOANS

BEATTY, Prudence Carter, U.S.B.J.

On July 5, 2005, Derek Kofi Jackson (the “Debtor”) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (the “Code”).¹ On April 10, 2006 he commenced this adversary proceeding pursuant to Code § 523(a)(8) seeking a hardship discharge of student loans he owes to The Educational Credit Management Corporation (“TERI”),² the Educational Credit Management Corporation (“ECMC”)³ and Brooklyn Law School.⁴

The Debtor is a thirty-six year old who emigrated from Ghana with his parents as a young child. He suffers from bipolar disorder among other serious health issues. Over the course of the past twenty years he has been institutionalized eight times and has attempted suicide on fourteen occasions. The Debtor has a partially paralyzed right hand as a result of one of his suicide attempts. The Debtor attended three colleges before he graduating in 1994. He also attended two law schools but withdrew before receiving his law degree. Since 1996 the Debtor has been employed intermittently and has held at least five jobs, with wildly varying salaries. He lost three of these jobs as a direct result of his bipolar disorder, one of them after only two weeks. He also lost one job due to downsizing. At trial the Debtor testified that he was on the verge of being fired from his current job because he incurred too many non-approved absences. The Debtor stated that these absences were caused by depression and lethargy during

¹ All references to the Bankruptcy Code are to the law as in effect prior to October 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

² TERI is a Massachusetts not-for-profit corporation.

³ ECMC is a Minnesota not-for-profit corporation created under the direction of the United States Department of Education (“DOE”) to provide specialized guarantor services to the DOE pursuant to the Federal Family Education Loan Program, including accepting transfer of title of certain student loan accounts on which the student loan borrower has filed a bankruptcy proceeding. ECMC was substituted as a defendant in this adversary proceeding through a stipulation approved by the Court on June 16, 2006.

⁴ Since Brooklyn Law School failed to answer the complaint or otherwise participate in the litigation, the Debtor is entitled to judgment by default against Brooklyn Law School.

his bipolar episodes. During periods of unemployment, the Debtor has, in the past, received Supplemental Security Income (“SSI”) from the Social Security Administration (“SSA”). The Debtor’s parents, who are senior citizens living in Ghana have, at times, helped the Debtor pay for his medical expenses, which includes ten medications and thrice weekly psychiatric consultations.

Both TERI and ECMC have opposed the relief requested. The Court conducted a trial on November 8, 2006 at which the Debtor was the only witness. Neither TERI nor ECMC offered any witnesses. Upon consideration of the Debtor’s testimony and post-trial filings⁵ by the parties, the Court finds that the Debtor has satisfied his burden of proof and holds that the Debtor is entitled to discharge his student loans.

BACKGROUND FACTS

A. The Debtor’s Student Loans

In his Chapter 7 petition, the Debtor stated that he owed \$147,293.77 in debts, which included a total of \$119,022.10 in student loans.⁶ The remaining balance consisted of almost \$30,000 in credit card debt, from which the Debtor has already received a discharge. Here, the Debtor seeks a discharge of the three educational loans he incurred while attending law school: (1) a consolidated private loan with an aggregate outstanding balance of \$56,504.66 as of October 31, 2006 which is now held by TERI (the “TERI Loan”), (2) a consolidated private loan with an aggregate outstanding balance of \$76,947.05 as of October 31, 2006 which is now

⁵ At trial the Court considered definitional material on Web MD, a website containing general medical information. TERI and ECMC objected and filed post-trial briefs. Given the objections and the Debtor’s own testimony as to his condition, the Court will decide this matter without reference to Web MD.

⁶ The amounts of the student loan obligations listed in Schedule F of the Debtor’s Chapter 7 petition differ somewhat from the amounts ECMC and TERI claim to be owed. The discrepancy, however, does not need to be resolved.

held by ECMC (the “ECMC Loan”) and (3) a private loan with Brooklyn Law School that had an outstanding balance of \$1,721.87 as of April 10, 2006.

As a student loan guarantor, TERI took assignment of the TERI Loan from American Education Services, which is the assignee of Key Bank U.S.A., N.A. Key Bank was the original lender of the TERI Loan, and First Marblehead Education Resources is the authorized servicing agent. The Debtor made an unknown number of payments on the TERI Loan until September 7, 2004. However, TERI did not offer any evidence establishing how many payments were made, when they were made or in what amount they were made. TERI asserts that as of July 6, 2003, the principal balance due on the TERI Loan was \$48,698.96. Interest continues to accrue at a rate of 8.30% per annum.

ECMC, also a student loan guarantor, took assignment of the ECMC Loan from Sallie Mae, Inc. The original lender of the ECMC Loan was Southwest Student Services Trust (“Southwest”). As of December 1997, the principal balance due on the ECMC Loan was \$68,691.40. The Debtor claims that he consolidated the loans while they were with Southwest, and admits that while he did obtain various forbearances and extensions to make payments that he never made any payments on the ECMC Loan. This loan currently bears interest at a rate of 6.375% per annum.

Prior to trial, both TERI and ECMC offered to assist the Debtor in consolidating his loans under the William B. Ford Direct Loan Program in order to help him to achieve greater flexibility in repaying his student loan obligations. His combined monthly repayment options were estimated at trial to be: (1) \$890.52 per month for 120 months; (2) \$492.03 per month for 360 months; or (3) \$445.26 per month for the first two years and \$475.79 per month for the remaining life of the loan under the Income Contingent Repayment Plan (“ICRP”). At trial,

ECMC referred to a new proposal that would enable the Debtor to repay the TERI Loan at \$475.00 per month for 10 years and the ECMC Loan at \$200 per month for 30 years. The Debtor testified that he rejected prior offers and refused to consider the proposed repayment plans because his monthly expenses already exceed his monthly income.

B. The Debtor's Employment and Medical History

At trial, the Debtor stated that besides bipolar disorder, he also suffers from several other health problems, including glaucoma, high blood pressure, sleep apnea and a partially paralyzed right hand. The most prominent of his health issues, however, is clearly bipolar disorder. Since the age of sixteen the Debtor has taken medication for this psychiatric disorder, and at the time of trial he was following a daily treatment plan that included taking six medications⁷ as well as thrice weekly consultations with his psychiatrist. He testified that he cannot work without taking his medication, and continues to suffer from chronic fatigue and difficulty concentrating.

The Debtor testified that he has attempted to commit suicide on fourteen occasions and that his right hand (he is right-handed) became partially paralyzed as a result of one of these attempts. Another suicide attempt caused him to withdraw from college his freshman year. The Debtor further testified that he has undergone eight psychiatric hospitalizations for bipolar disorder and that his mental illness was the reason that he transferred from his first law school and withdrew from Brooklyn Law School prior to graduation.

The Debtor testified that his bipolar disorder interfered with his ability to maintain continuous employment. After withdrawing from Brooklyn Law School, the Debtor obtained employment as a paralegal at a law firm. He testified that his position was terminated as soon as the firm learned that he was being treated for bipolar disorder. Following his short employment

⁷ The Debtor testified that he took four additional prescriptions to treat his other health problems.

at that law firm, the Debtor was employed intermittently as a paralegal at the NAACP Legal Defense Fund for one year, and at the King's County District Attorney's Office for two weeks. He testified that he was asked to leave these positions following manic episodes that occurred as a result of his bipolar disorder. During one of his manic episodes, the Debtor states that he destroyed the desks and furniture in his office. The Debtor also worked at another law firm for two years, but lost his job due to downsizing.

During periods of unemployment, the Debtor testified that he has had deferments and forbearances for his student loans. He also testified that he has received SSI from the Social Security Administration while he was unemployed since the SSA deemed him disabled due to his bipolar disorder.

At the time of trial, the Debtor maintained a position with the law offices affiliated with a nationally known insurance company as a no-fault paralegal, earning a gross income of \$40,456.00. He testified that the position he held as of the trial date originally started as a temporary position but turned into a full time position in December 2005. After deduction of taxes, the Debtor stated that he received a total net monthly salary of \$2114.60, paid in bi-weekly checks of \$1057.30.⁸ In 2003, the Debtor stated that he earned approximately \$29,000 and in 2004, approximately \$18,000.

The Debtor testified, however, that he was in danger of being terminated by his employer as a result of symptoms from his bipolar disorder. According to his company's absentee policy, if an employee incurs six non-approved absences, the employee will receive a warning, and will then be terminated if another non-approved absence is sustained. At the time of trial, the Debtor had incurred six non-approved absences and had already received a warning.

⁸ The Debtor's total net monthly income was lower than previous accounts since he had recently taken out a loan for \$1000 from his 401K in June 2006, which he was repaying at the time of trial.

He testified that he was absent on these days due to symptoms of depression and lethargy arising from bipolar disorder and he could not obtain approval of those absences after the fact.

C. The Debtor's Monthly Expenses

The Debtor's monthly expenses listed in Schedule J of his Chapter 7 petition are \$3939.00, an amount in excess of his total monthly income. The Debtor's testimony at trial, however, indicates that his expenses, in fact, are somewhat less. The Debtor spends \$811.50 in rent for his apartment in New York City. He incurs \$500.00 per month in travel expenses, the majority of which is spent on public transportation for the Debtor to travel to his job in Westchester County, New York and includes a monthly MetroNorth train pass, and fare for two additional buses and a subway for each way of his daily commute. He also spends \$150.00 for his cell phone, \$80.00 for clothing, \$80.00 for his laundry and dry cleaning, between \$400.00 - \$600.00 for food, \$100.00 for recreation, which includes \$91.00 for cable TV and a broadband internet connection,⁹ and \$90.00 for electricity and heating fuel. Additionally, the Debtor has \$145.00 deducted from his paycheck from his employer and placed into a profit-sharing account on a monthly basis.

The Debtor testified that he has expenses of \$150.00 per month for health insurance, \$115.00 per month for life insurance and \$700.00 per month for medical expenses, which includes the cost of his medications and the co-pay for thrice weekly doctor's visits. His medical expenses and life insurance premiums are paid by his parents in Ghana, rather than by the Debtor. This alleviates a total of \$965.00 per month in medical expenses for the Debtor.

Even with his parents' financial assistance, the Debtor's monthly expenses amount to a minimum of \$2661.50, \$546.90 more than his monthly income. Although some portion of his monthly expenses, including food costs, transportation and the contribution to his

⁹ Cable expense is a fact of life in New York City where television reception is poor to non-existent in its absence.

401K may be considered somewhat discretionary or subject to reduction, even if these expenses were eliminated, such reductions would be inconsequential in light of the fact that the Debtor's expenses must be considered to include his necessary medical expenses. While the Debtor's parents provide additional financial support at this time to reduce this disparity, they are under no obligation to do so, nor can their aid continue to be relied on with certainty given their age and lack of presence in the United States. Without their assistance, the Debtor would be required to bear the full amount of these necessary medical expenses.

DISCUSSION

The Debtor seeks to have his student loans discharged pursuant to the "undue hardship" exception of § 523(a)(8) of the Code.¹⁰ A student loan cannot be discharged unless the debtor "affirmatively secures a hardship determination." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004). "Undue hardship" is not defined by the Code or the legislative history of § 523(a)(8). In *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), however, the Second Circuit outlined a three-prong test to determine whether a person has established "undue hardship." The elements that must be satisfied include: (1) whether the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the student loans, (2) whether additional circumstances exist that may suggest that the debtor's current financial status would likely persist for a significant portion of

¹⁰ § 523(a)(8) provides that:

(a) A discharge under [certain section of the Code] does not discharge an individual debtor from any debt-
* * *
(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, * * * unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

the repayment period, and (3) whether the debtor has made a good faith effort to attempt to repay the student loans. *See id.* at 396.

Congress intended that student loans be discharged in rare cases of exceptional circumstance. *See In re Holzer*, 33 B.R. 627, 630 (Bankr. S.D.N.Y. 1983). Accordingly, the burden to prove the elements of the *Brunner* test falls upon the debtor. *Thoms v. Educational Credit Management Corp. (In re Thoms)*, 257 B.R. 144, 148 (Bankr. S.D.N.Y. 2001). Each factor must be satisfied by a preponderance of the evidence to permit the discharge of a student loan. *In re Williams*, 296 B.R. 298 302 (Bankr. S.D.N.Y. 2003); *In re Congdon*, 2007 WL 942202, at *3 (Bankr. D.Vt. March 29, 2007). The basic analysis of such issues, however, is a mixed question of law and fact, which requires courts to consider the unique or extraordinary circumstance of a particular situation on a fact-intensive, case-by-case approach. *In re Mosley*, 330 B.R. 832, 840 (Bankr. N.D.Georgia 2005); *In re Faish*, 72 F.3d 298, 302 (3d Cir. 1995).

A. The First *Brunner* Factor

Under the first prong of the *Brunner* test, a debtor must show that he cannot, based upon his current income and expenses, both maintain a minimal standard of living and repay his student loans. *Brunner* 831, F.2d at 396. To satisfy this element, a debtor must demonstrate more than tight finances, although a debtor is not required to live at or below the poverty line. *In re Pincus*, 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002); *See also In re Kelly*, 351 B.R. 45, 53 (Bankr. E.D.N.Y. 2006); *Faish*, 72 F.3d at 386. This Court, therefore, must “review the reasonableness” of the Debtor’s budget to determine whether any “undue hardship” in fact exists, or if the Debtor’s monthly budget is excessive in light of the sacrifices that often accompany the repayment of one’s student loan obligations. *Pincus*, 280 B.R. at 317.

In *Pincus*, this Court denied a debtor's request to discharge his student loan obligations pursuant to Code § 523(a)(8) because his monthly expenditures were excessive. In finding that the debtor failed to satisfy the first prong of *Brunner*, this Court found that he did not show sufficient efforts to minimize certain discretionary expenses and that reasonable low or no cost alternatives were available to avoid certain expenses. 280 B.R. 303, 317-18. Here, however, the Court is persuaded that the Debtor's monthly expenses are reasonable and, therefore, that the Debtor has sustained his burden of proof.

Unlike the circumstances in *Pincus*, in the present matter, no matter what discretionary expenses are reduced and/or eliminated, the Debtor will still be saddled with large and necessary medical expenses that together with his other expenses, will leave no surplus for student loan repayment. The Court finds the amount the Debtor pays in rent to be reasonable, particularly in light of the tight apartment market in New York City. Additionally, the Court finds the amount the Debtor spends per month on transportation costs to be reasonable. This amount is reasonable particularly in light of the greater comparative expense that the purchase of an automobile would entail, which would include the cost of gas, parking and repairs. The Court further finds the Debtor's expenditure of \$91.00 per month for cable and internet access to be reasonable. The Debtor testified that he lives in an area that receives very poor television reception, which is true of New York City in general, and that he uses the internet to communicate via e-mail with his parents in Ghana. The Debtor testified as to his profound sense of loneliness and the absence of a supportive circle of friends.

The ECMC contends that since the Debtor's parents regularly supplement the Debtor's income by paying most, if not all, of his monthly medical expenses, the Debtor can, therefore, afford to repay his ECMC Loan. The Court finds this argument unpersuasive. While

the Debtor's parents may currently pay \$965.00 of his monthly expenses, it is not the case that this help leaves the Debtor with excess funds or the ability to reallocate his funds to make current or, more specifically, future student loan payments. Nor is it evident that the Debtor can rely upon this additional source of financial assistance for longer than the immediate future. The Debtor's parents are into their retirement years. While the Debtor's 68-year-old father continues to work, this employment does not override the fact that even with his parent's financial contributions, the Debtor's monthly expenses are still greater than his monthly income and that he will necessarily have to economize to remain debt free post-petition. Moreover, nothing in the record suggests that the Debtor has any source of income other than his own earnings and whatever his parents choose to give him. Certainly SSI or any unemployment insurance would not cover his monthly expenses and would only be available were he to become unemployed. The Court, therefore, concludes that the Debtor satisfies the first prong of the *Brunner* test and has established that he cannot sustain a minimal standard of living absent a discharge of his student loans.

B. The Second Brunner Factor

The second prong of the *Brunner* test requires a debtor to show that current financial difficulties will likely persist for an extended period of time. *Brunner*, 831 F.2d at 396. Under this factor, debtors must demonstrate "unique or exceptional circumstances in their current situations that would clearly limit their future abilities to earn a living, support themselves, and repay their loans." *In re King*, 2007 WL 1404380, at *9 (Bankr. D.Vt. May 11, 2007).¹¹ Serious illness is frequently cited as an exceptional hardship that establishes a showing of undue hardship. *Id.*; *See also Hertzfel*, 329 B.R. 221, 229-30 (6th Cir. 2005); *In re Pace*, 2888

¹¹ Several courts have also required that the debtor display a "certainty of hopelessness" in addition to a present inability to pay the financial obligation. *See In re Triplett*, 357 B.R. 739, 743 (Bankr. E.D.Va. 2006); *In re*

B.R. 788, 792 (Bankr. S.D.Ohio 2003); *Thoms* 257 B.R. at 149; *In re Lohman*, 79 B.R. 576, 581 (Bankr. D.Vt. 1987);

TERI and ECMC state that since no “corroborative evidence” has been presented to show that the Debtor has an impairment that prevents him from earning a sufficient salary to repay his loans that will likely to continue well into the future, the second prong of *Brunner* cannot be satisfied. See *In re Norasteh*, 311 N.R. 671, 678 (Bankr.S.D.N.Y. 2004); *In re Swinney*, 266 B.R. 800 (Bankr.N.D.Ohio 2001). TERI and ECMC therefore argue that the Debtor can continue working into the future and may even be able to increase his earnings. However, neither ECMC nor TERI offered any testimony to support this contention nor did their examination of the Debtor undermine his credibility.

The Debtor in this case represents himself *pro se* because he is not in a position to obtain legal counsel or expert medical witnesses due to his financial position. See *In re Mosley*, 330 B.R. 832, 843 (Bankr. N.D.Georgia 2005). Requiring that a debtor provide corroborative medical evidence beyond their own testimony in order to sustain the evidentiary burden for a hardship discharge of a student loan on medical grounds is likely to prevent *pro se* debtors from receiving the relief to which they are entitled because they “cannot afford to hire medical experts to testify to the effect of their disease on their earning capacity.” *In re Doherty*, 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998). Several courts have used judicial notice in the absence of expert medical testimony to evaluate and understand a debtor’s medical representations under the second prong of *Brunner*. See *In re Pobiner*, 309 B.R. 405, 420 (Bankr. E.D.N.Y. 2004)

Brightful, 267 F.3d 324, 328 (3d Cir. 2001). This Court agrees with the analysis in *In re King*, 2007 WL 1404380, at *9-12 (Bankr. D.Vt. May 11, 2007), which discussed the vague, speculative and completely subjective aspects of the “certainty of hopelessness” standard. Rather, “[I]t requires the person who testifies to it or the court that invokes it to be able to predict with 100% certainty that the debtor’s future is incapable of redemption or improvement.” Instead focus should be placed on the unique circumstances of the particular situation. *ECMC v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004); *In re Hoskins*, 292 B.R. 883, 887 (7th Cir. 2002); *Tennessee Student Assistance Corp. v. Hornsby*, 144 F.3d 433, 437 (6th Cir. 1998).

(reviewing publications by NIMH regarding ADHD and taking judicial notice of career prospects of ADHD patients); *Doherty*, 219 B.R. at 669 (taking judicial notice of National Institute of Mental Health's depression treatment campaign regarding bipolar disorder). The court in *In re Green*, 238 B.R. 727, 736-36 (Bankr. S.D.Ohio 1999), however, used a different approach by examining trends in a debtor's employment history, and held that in the absence of expert testimony, this is the "next best indicator" of a debtor's future ability to obtain and maintain employment.

In the instant case, the Debtor testified as to the debilitating nature of his bipolar disease including his numerous prior suicide attempts, hospitalizations and the many medications he takes to control his condition.¹² See Fed. R. Evid. 401,¹³ 601,¹⁴ 602¹⁵ and 701¹⁶. He stated that he suffered side effects from the medications including chronic fatigue and that his depression is not fully alleviated, which the Court was able to observe while he was giving his trial testimony. The Debtor testified as to the negative impact of his bipolar disorder on his past

¹² The Debtor attempted to put letters from his personal physician that described his bipolar condition and future prognosis into evidence, but this was rejected due to objections from the lenders on the grounds that the letter was hearsay.

¹³ Fed. R. Evid. 401 provides that relevant evidence:

"means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

¹⁴ Fed. R. Evid. 601 provides that:

"Every person is competent to be a witness except as otherwise provided in these rules."

¹⁵ Fed. R. Evid. 602 provides that, subject to Fed. R. Evid. 703:

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

¹⁶ Fed. R. Evid. 701 provides that:

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

and the likely impact it will have on the current position. It is reasonable to project these problems will affect all of his future employment efforts.

The Court finds that that the Debtor has established that his bipolar disorder is severe enough to impair his present ability to maintain regular employment and repay his loans, and that this condition will persist indefinitely. Moreover, the Debtor has demonstrated that he is not capable of maintaining his mental “status quo” at all times, and despite times of relative normalcy, continues to experience manic episodes and symptoms of depression that substantially interfere with his ability to maintain employment. In concluding that the Debtor’s future prognosis is not likely to improve, the Court bases its analysis on the “trends that have occurred in [the Debtor’s] past” as the Debtor’s prior employment and educational history have been continuously interrupted due to his bipolar disorder. *See Green*, 238 B.R. at 736-36.

The Court’s view is supported by the Debtor’s testimony that his condition is chronic since he is receiving, and has received, regular medical treatment for his condition since he was a teenager. The Debtor testified that he often has “suicidal ideation” and that he had those feelings the day of the trial. Upon examination of prior trends in the Debtor’s health, educational, employment and earning history it is evident that he will continue to have difficulties maintaining and finding full-time permanent employment and may again be in need of SSI. Nor can the Court ignore the significant mental stress that this Debtor would suffer if his student loans were not discharged, thereby exacerbating his unstable mental condition. The Debtor’s undergraduate and graduate school education was disrupted on several occasions due to suicide attempts and other effects of bipolar disorder, causing him to transfer and attend three different undergraduate institutions, two different law schools and fail to graduate from law school. Additionally, his erratic employment history includes two instances where he suffered

manic episodes arising from his bipolar disorder which caused him to lose his position and one instance where he lost a job simply because the employer learned of his disorder, although he was not symptomatic. While the Debtor currently maintains a full-time permanent position, he testified that he is on the verge of being fired due to excess non-approved absences that he incurred as a result of experiencing symptoms of depression and lethargy. Accordingly, the Court finds that the Debtor has sustained his burden in satisfying the second prong of the *Brunner* analysis.

C. The Third *Brunner* Factor

The third prong of the *Brunner* analysis requires that a debtor show a good faith effort to repay his student loan obligations. *Brunner*, 831 F.2d at 396. This element of the analysis considers whether a debtor willfully or negligently caused his own default, or if his financial difficulties resulted from “factors beyond his reasonable control.” *See in re Elmore*, 230 B.R. 22, 27 (Bankr.D.Conn. 1991). In this Court’s view, an illness such as the Debtor’s bipolar disorder, which results in periodic but sustained loss of income, is a factor beyond the debtor’s reasonable control. In evaluating whether a debtor demonstrates good faith, several factors are considered “includ[ing] the number of payments made by the debtor, the debtor’s attempt to negotiate with the lender, the proportion of the loans to total debt, and possible abuse of the bankruptcy process.” *In re Markley*, 236 B.R. 242, 248 (Bankr. N.D.Ohio 1999).

Here, with respect to the TERI Loan, the Debtor made an unknown number of payments, and testified that he often borrowed money from his parents to avoid defaulting on this loan. His payments continued until September 7, 2004. TERI, however, failed to present any evidence as to when payments were made and in what amounts. As to ECMC, the Debtor did not make any payments on his ECMC loan, although he did seek and obtain several

forbearances and deferments. Both TERI and ECMC maintain that the Debtor's failure make continued payments on both loans impair his ability to demonstrate good faith. The Court disagrees and concurs with the view that "good faith does not solely depend on attempts at repayment." *Green*, 329 B.R. at 233. In fact, this Court fails to understand how a debtor can be barred from establishing good faith if he or she was never informed that partial payments (i.e. payments less than the stated billed amounts), no matter how small, should be made and would be accepted by the lender. Had the Debtor made partial payments, even in amounts as small as a few dollars, it would have sufficed to show good faith under *Brunner*. It appears that even the lenders would have had to agree that he would have shown good faith under *Brunner*.

The lenders, however, never informed the Debtor that partial payments would be accepted and that such payments were not only acceptable but also essential to establish a finding of good faith if he should later default or seek to have his loan discharged. Instead, the lenders withheld from the Debtor any information that they would accept lesser payments when he could not afford to pay the full amount on his statement.

A lender's failure to inform debtors of the advantages of partial payments prior to default provides a substantial lender-created barrier to a finding of good faith by a debtor. Such a scheme is not only unfair to debtors but also inappropriately skews the *Brunner* analysis in the favor of lenders. Accordingly, this Court finds that although the Debtor made only some payments on the TERI Loan and failed to make payments on the ECMC Loan, this failure does not prohibit a finding of good faith since he was not aware that the lenders would have accepted partial payments on both loans. Moreover, his mental and financial condition impaired his ability to make payments.

TERI and ECMC also contend that the Debtor's refusal to enter into the ICRP option under the William D. Ford Direct Loan Consolidation Program prevents him from demonstrating good faith to repay his loans. If the Debtor were to agree to a repayment scheme, such as the one offered a trial, he would be required to repay the TERI Loan at \$475.00 per month for 10 years and the ECMC Loan at \$200 per month for the next 30 years, when he would be sixty-six years old. This would cause the Debtor to be responsible for an additional \$675.00 per month in student loan obligation expenses in addition to the monthly expenses he already incurs. The Debtor presently does not earn enough income to cover his basic living and medical expenses without the financial assistance of his parents and has decidedly uncertain prospects for future continuous employment and stable mental health. SSI payments or unemployment insurance would be only a fraction of what he earns and would not cover his rent let alone the proposed loan payments.

Finally, TERI and ECMC claim that the Debtor failed to show good faith since his student loans comprise 80.8% of his total debts in total debt. In *Pincus*, however, the Court stated that placing a substantial emphasis on such circumstances is "misguided." 280 B.R. at 318. Although such a consideration may be relevant, it is clear that the Debtor is not seeking to have his student loans discharged prior to beginning a lucrative career. *See id.* Rather, "the Debtor's current financial position mirrors his future earning potential." *Id.* Indeed, the Debtor's present situation is in all likelihood better than his future long and short-term prospects. The Debtor has waited a substantial period of time before acknowledging that his health and employment conditions would necessitate his seeking a discharge of his student loan obligations. The Court, therefore, finds that the Debtor has satisfied the good faith requirement of the *Brunner* test.

CONCLUSION

For the foregoing reasons, the Court finds that the Debtor has satisfied all three elements of the *Brunner* test and is entitled to discharge his student loan obligations pursuant to Code § 523(a)(8).

Settle Appropriate Judgment.

Dated: New York, New York
August 9, 2007

/s/ Prudence Carter Beatty
United States Bankruptcy Judge